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Report of Working Group II (Dispute Settlement) on the work of its sixty-eighth session (New York, 5–9 February 2018)

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I. Introduction

1. At its forty-eighth session, in 2015, the Commission mandated the Working Group to commence work on the topic of enforcement of settlement agreements to identify relevant issues and develop possible solutions, including the possible preparation of a convention, model provisions or guidance texts. The Commission agreed that the mandate of the Working Group should be broad to take into account the various approaches and concerns.[1] The Working Group commenced its consideration of that topic at its sixty-third session (A/CN.9/861).

2. At its forty-ninth session, in 2016, the Commission had before it the report of the Working Group on the work of its sixty-third and sixty-fourth sessions (A/CN.9/861 and A/CN.9/867, respectively). After discussion, the Commission commended the Working Group for its work on the preparation of an instrument dealing with enforcement of international commercial settlement agreements resulting from conciliation and confirmed that the Working Group should continue its work on the topic.[2]

3. At its fiftieth session, in 2017, the Commission had before it the report of the Working Group on the work of its sixty-fifth and sixty-sixth sessions (A/CN.9/896 and A/CN.9/901, respectively). The Commission took note of the compromise reached by the Working Group at its sixty-sixth session, which addressed five key issues as a package (A/CN.9/901, para. 52) and expressed support for the Working Group to continue pursuing its work based on that compromise. The Commission expressed its satisfaction with the progress made by the Working Group and requested the Working Group to complete the work expeditiously.[3]

4. At its sixty-seventh session (A/CN.9/929), the Working Group requested the Secretariat to prepare a revised draft of amendments to the UNCITRAL Model Law on International Commercial Conciliation ("Model Law on Conciliation" or "Model Law") and a draft convention, reflecting the deliberations and decisions of the Working Group.

II. Organization of the session

5. The Working Group, which was composed of all States members of the Commission, held its sixty-eighth session in New York, from 5–9 February 2018. The session was attended by the following States members of the Working Group: Argentina, Australia, Austria, Bulgaria, Cameroon, Canada, Chile, China, Colombia, Czechia, Denmark, Ecuador, El Salvador, France, Germany, Greece, Hungary, India, Indonesia, Israel, Italy, Japan, Kuwait, Lebanon, Libya, Malaysia, Mexico, Namibia, Nigeria, Philippines, Republic of Korea, Romania, Russian Federation, Sierra Leone, Singapore, Spain, Switzerland, Thailand, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

6. The session was attended by observers from the following States: Algeria, Belgium, Benin, Cyprus, Democratic Republic of the Congo, Dominican Republic, Finland, Iraq, Morocco, Nepal, Netherlands, Norway, Saudi Arabia, Syrian Arab Republic and Viet Nam.

7. The session was also attended by observers from the European Union and the Holy See.

8. The session was also attended by observers from the following invited non-governmental international organizations: American Arbitration

[1] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), paras. 135–142.

[2] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), paras. 162–165.

[3] Ibid., *Seventy-second Session, Supplement No. 17* (A/72/17), paras. 236–239.

Association/International Centre for Dispute Resolution (AAA/ICDR), American Bar Association (ABA), Arab Association for International Arbitration (AAIA), Arbitrators' and Mediators' Institute of New Zealand (AMINZ), Beijing Arbitration Commission/Beijing International Arbitration Center (BAC/BIAC), Belgian Centre for Arbitration and Mediation (CEPANI), Chartered Institute of Arbitrators (CIARB), China International Economic and Trade Arbitration Commission (CIETAC), Commonwealth Secretariat (CS), Forum for International Conciliation and Arbitration (FICA), Hong Kong Mediation Centre (HKMC), Inter-American Bar Association (IABA), Inter-American Commercial Arbitration Commission (IACAC), International Academy of Mediators (IAM), International Institute for Conflict Prevention & Resolution (CPR), International Law Association (ILA), International Mediation Institute (IMI), Jerusalem Arbitration Centre (JAC), Korean Commercial Arbitration Board (KCAB), Law Association for Asia and the Pacific (LAWASIA), Madrid Court of Arbitration, Miami International Arbitration Society (MIAS), Milan Club of Arbitrators (MCA), Moot Alumni Association (MAA), New York International Arbitration Center (NYCIAC), Panel of Recognised International Market Experts in Finance (P.R.I.M.E.), Regional Centre for International Commercial Arbitration, Lagos (RCICAL), Russian Arbitration Association (RAA) and The European Law Students' Association (ELSA).

9. The Working Group elected the following officers:

Chairperson: Ms. Natalie Yu-Lin Morris-Sharma (Singapore)

Rapporteur: Mr. Khory McCormick (Australia)

10. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.204); and (b) note by the Secretariat regarding the preparation of instruments on enforcement of international commercial settlement agreements resulting from mediation (A/CN.9/WG.II/WP.205 and addendum).

11. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Preparation of instruments on enforcement of international commercial settlement agreements resulting from mediation.
5. Future work.
6. Adoption of the report.

III. Deliberations and decisions

12. The Working Group considered agenda item 4 on the basis of the note by the Secretariat (A/CN.9/WG.II/WP.205 and addendum). The deliberations and decisions of the Working Group with respect to item 4 are reflected in chapter IV, and deliberations and decisions with respect to item 5 are reflected in chapter V.

13. At the closing of its deliberations, the Working Group requested the Secretariat: (i) to prepare a draft convention and draft amended Model Law ("draft instruments") based on the deliberations and decisions of the Working Group and, in that respect, to make the necessary drafting adjustments to ensure consistency of language in the text of the draft instruments; and (ii) to circulate the draft instruments to Governments for their comments, with a view to consideration of the draft instruments by the Commission at its fifty-first session, to be held in New York from 25 June–13 July 2018.

IV. International commercial mediation: preparation of instruments on enforcement of international commercial settlement agreements resulting from mediation

14. The Working Group continued its deliberations on the preparation of the draft instruments on the basis of document A/CN.9/WG.II/WP.205 and its addendum.

15. The Working Group agreed to consider issues in the order that they were raised in document A/CN.9/WG.II/WP.205, taking into account the draft text of the instruments as presented in document A/CN.9/WG.II/WP.205/Add.1 and any other drafting suggestions.

A. Terminology

16. The Working Group took note of, and approved the replacement of the term "conciliation" by "mediation" throughout the draft instruments. The Working Group further approved the explanatory text describing the rationale for that change (see A/CN.9/WG.II/WP.205, para. 5), which would be used when revising existing UNCITRAL texts on conciliation.

B. Scope and exclusions

1. Scope of application (articles 1(1) and 3(1) of the draft convention)

17. It was suggested that the use of the term "international agreements" in article 1(1) of the draft convention could raise confusion as that expression often referred to agreements between States or other international legal persons binding under international law. Based on the shared understanding that the draft convention should avoid using the term "international agreement", it was suggested that articles 1(1) and 3(1) of the draft convention should be merged into a single paragraph, with no reference to the term "international" before the word "agreement". Those suggestions received support.

18. After discussion, the Working Group decided that article 1(1) of the draft convention could read as follows: "This Convention applies to agreements resulting from mediation and concluded in writing by parties to resolve a commercial dispute ('settlement agreements') if, at the time of the conclusion of that agreement: (a) at least two parties to the settlement agreement have their places of business in different States; or (b) the State in which the parties to the settlement agreement have their places of business is different from either: (i) the State in which a substantial part of the obligations under the settlement agreement is performed; or (ii) the State with which the subject matter of the settlement agreement is most closely connected."

19. However, questions were raised on which terminology would be used to refer to settlement agreements that fell under article 1(1), particularly in the title of the draft convention. In addition, a concern was expressed that combining articles 1(1) and 3(1) may introduce a structural flaw as it would result in combining a provision on the scope of application with a provision on the definition of the term "international".

20. Having considered the suggested modifications further, there was general support in the Working Group to merge articles 1(1) and 3(1) of the draft convention. On the other hand, based on a preference to include the term "international settlement agreements" in the title of the draft convention (see para. 143 below), it was suggested that article 1(1) should include a reference to "international" settlement agreements in some fashion, for example, by adding the words "which are international in that" in the chapeau or by including at the end of that paragraph "(hereinafter referred to as "international settlement agreements")". With respect to the latter example, it was pointed out that caution should be taken as the remaining parts of the draft convention simply referred to "settlement agreements". Overall, there was general support for

inserting the term "international" in article 1(1) and the Secretariat was requested to formulate a draft for consideration by the Commission.

21. Subject to that change, the Working Group approved in substance article 1(1) of the draft convention as reflected in paragraph 18 above.

22. With regard to the corresponding changes that might need to be implemented in the draft amended Model Law (for example, articles 1(1), 15(1), 15(4) and 15(5)), the Working Group decided to consider them separately at a later stage of its deliberations (see paras. 120–127 below).

2. Exclusions from the scope (articles 1(2) and 1(3) of the draft convention and articles 15(2) and 15(3) of the draft amended Model Law)

23. With regard to the exclusions provided in article 1(2) of the draft convention and article 15(2) of the draft amended Model Law, suggestions to move the phrase "concluded to resolve a dispute" in subparagraph (i) to the chapeau of that paragraph and to delete that phrase entirely did not receive support. It was explained that the two types of exclusion should be treated differently, which was adequately reflected in the current text. After discussion, the Working Group approved in substance article 1(2) of the draft convention and article 15(2) of the draft amended Model Law, unchanged.

24. With respect to a question whether the draft instruments should set forth how a competent authority would ascertain whether a settlement agreement fell within the scope of article 1(3) of the draft convention and article 15(3) of the draft amended Model Law, it was noted that such a procedure would largely depend on the domestic rules of procedure and, therefore, it was not necessary for the draft instruments to prescribe any particular procedure for that purpose. After discussion, the Working Group approved in substance article 1(3) of the draft convention and article 15(3) of the draft amended Model Law, unchanged.

C. General principles

25. Subject to further deliberations on the appropriateness of using the term "Contracting States" in the draft convention (see paras. 116–118 below), the Working Group approved in substance article 2 of the draft Convention and article 16 of the draft amended Model Law, unchanged.

D. Definitions

26. The Working Group considered article 3 of the draft convention taking into consideration the suggested modification to article 1(1) (see paras. 18, 20 and 21 above). It was clarified that paragraph 1 of article 3 would be deleted resulting in the consequential change of numbering to the remaining paragraphs. It was further agreed that the current paragraph 2 (renumbered paragraph 1) would begin with the words "For the purposes of article 1, paragraph 1 (...)".

1. Notion of "place of business"

27. The Working Group then considered whether the current article 3, paragraph 2 of the draft convention should be expanded to also cover situations where parties would have their places of business in the same State, but the settlement agreement would nevertheless contain an international element, for instance, where the parties' parent company or shareholders were located in different States. It was mentioned that such an approach would reflect current global business practices as well as complex corporate structures. Nonetheless, it was generally felt that it would not be feasible to agree on a simple and clear formulation that would be generally acceptable in different jurisdictions. It was also mentioned that introducing such an expansion could unduly burden the competent authority as it would have to assess the corporate

structure of the parties. Furthermore, it was mentioned that introducing such language could pose conflicts with relevant domestic laws and regulations.

28. After discussion, the Working Group approved in substance article 3(2) of the draft Convention and article 15(5) of the draft amended Model Law, unchanged (for further consideration of article 15(5) of the draft amended Model Law, see para. 127 below).

2. Definition of "writing requirement"

29. The Working Group approved in substance article 3(3) of the draft Convention and article 15(6) of the draft amended Model Law, unchanged.

3. Definition of "mediation"

30. With regard to the definition of "mediation" in article 3(4) of the draft convention and article 1(3) of the draft amended Model Law, it was noted that they were formulated slightly differently reflecting the nature of the respective instruments.

31. In that context, a concern was expressed that the phrase "lacking the authority to impose a solution upon the parties to the dispute" might be interpreted to exclude from the scope of the draft instruments circumstances where the appointed mediator was also expected to act as an arbitrator if the parties were not able to reach an amicable solution at the end of the mediation.

32. Acknowledging the growth of such "med-arb" practice, it was suggested that the phrase "at the time of mediation" could be added at the end of those paragraphs to clarify the condition that the mediator was not able to impose a solution was limited to the stage of mediation. While some support was expressed for the clarification, it was mentioned that the addition would be unnecessary as the current text applied to med-arb situations, and a mediator in a med-arb proceeding would only be able to impose a solution once it started its functions as an arbitrator. Accordingly, the Working Group approved in substance article 3(4) of the draft convention and article 1(3) of the draft amended Model Law, unchanged.

F. Application

1. Notion of application

33. The Working Group considered article 4 of the draft convention and article 17 of the draft revised Model Law, which addressed the requirements for parties to apply to the competent authority.

34. A suggestion was made to revise the chapeau of paragraph 1 so as to include the term "application" in line with the heading of the provisions as follows. Article 4(1) of the draft convention would read: "A party relying on a settlement agreement under this Convention shall make an application to the competent authority of the Contracting State where relief is sought and supply: (...)" ; and article 17(1) of the draft amended Model Law would read: "A party relying on a settlement agreement under this section shall make an application to the competent authority of this State and supply: (...)".

35. A further suggestion was made that the headings of article 4 of the draft convention and article 17 of the draft amended Model Law should be amended so as to refer to "requirements" for application in order to better capture their content.

36. During its consideration of article 4 of the draft convention and article 17 of the draft amended Model Law, the Working Group confirmed its understanding that those provisions should apply to both instances as provided for in article 2 of the draft convention and article 16 of the draft amended Model Law (i.e., where the request related to the enforcement of a settlement agreement and where the settlement agreement was invoked as a defence against a claim). It was said that the use of the

term "application" could be understood as only referring to procedures for requesting enforcement, and not necessarily to procedures where the settlement agreement was invoked as a defence. Accordingly, the Working Group agreed that the draft instruments should avoid using the term "application".

37. After discussion, the Working Group agreed that: (i) the heading of article 4 of the draft convention and article 17 of the draft amended Model Law should read "Requirements for reliance on settlement agreements"; (ii) the chapeau of article 4(1) of the draft convention and of article 17(1) of the draft amended Model Law should remained unchanged; (iii) the words "where the application is made" and "the party making the application" in article 4(3) of the draft convention and 17(3) of the draft amended Model Law should be replaced respectively by the words "where relief is sought" and "the party requesting relief"; and (iv) the word "the application" in article 4(5) of the draft convention and article 17(5) of the draft amended Model Law should be replaced by the words "the request for relief".

2. Settlement agreement resulting from mediation

38. The Working Group considered article 4(1)(b) of the draft convention and article 17(1)(b) of the draft amended Model Law, which provided an illustrative and non-hierarchical list of means to evidence that a settlement agreement resulted from mediation. To highlight that the list was non-exhaustive and did not enumerate the entirety of evidence that might be provided, a suggestion was made to add the words "and/or" following each subparagraph. After discussion, the Working Group agreed that the non-exhaustive nature of the list was clearly expressed through subparagraph (iv). It was reiterated that the understanding of the Working Group was that only if the evidences mentioned in subparagraphs (i) to (iii) could not be produced, then would the requesting party be allowed to submit any other evidence.

3. Use of the terms "conditions" — "requirements"

39. In relation to article 4(4) of the draft convention and article 17(4) of the draft amended Model Law, the Working Group considered whether the word "conditions" or "requirements" should be used. After discussion, it was agreed that the word "requirements" should be used in article 4 for the sake of consistency (see articles 4(2) of the draft convention and 17(2) of the draft amended Model Law referring to "requirement").

F. Defences

40. The Working Group considered article 5 of the draft convention and article 18 of the draft amended Model Law, which addressed grounds for refusing to grant relief.

41. The Working Group confirmed that the grounds listed for refusing to grant relief in those provisions applied both to requests for enforcement (under article 2(1) of the draft convention and article 16(1) of the draft amended Model Law) and to situations where a party invoked a settlement agreement as a defence against a claim (under article 2(2) of the draft convention and article 16(2) of the draft amended Model Law). Accordingly, the Working Group agreed that article 5 should avoid language referring only to enforcement or only to invoking a settlement agreement.

1. Chapeau of article 5(1) of the draft convention and article 18(1) of the draft amended Model Law

42. In line with the decision that the word "application" should not be used in article 4 of the draft convention and article 17 of the draft revised Model Law (see para. 36 above), the Working Group agreed to amend the chapeau of the provisions as follows. Article 5(1) of the draft convention would read: "The competent authority of the Contracting State where relief is sought under article 4 may refuse to grant relief at the request of the party against whom the relief is sought, only if that party furnishes to the competent authority proof that: (...)"; and article 18(1) of the draft

amended Model Law would read: "The competent authority of this State may refuse to grant relief at the request of the party against whom the relief is sought, only if that party furnishes to the competent authority proof that: (...)".

2. Article 5(1)(b) of the draft convention and article 18(1)(b) of the draft amended Model Law

43. Recalling a suggestion made at a previous session of the Working Group (see A/CN.9/896, para. 100), it was reiterated that the word "voidable" should be inserted after the word "void" to put it beyond doubt that subparagraph (b) covered instances of fraud, mistake, misrepresentation, duress and deceit. After discussion, the Working Group reaffirmed its understanding that the current wording of subparagraph (b) was sufficiently broad to encompass those elements and concluded that the addition of the word "voidable" was not necessary.

3. Article 5(1)(c) of the draft convention and article 18(1)(c) of the draft amended Model Law

44. The Working Group recalled that subparagraph (c) had been the subject of extensive deliberations at its previous sessions. A number of suggestions were made with a view to clarifying its drafting.

45. In relation to subparagraph (c)(ii), it was suggested to add the word "substantially" after the word "subsequently" to clarify that minor modifications should not be a ground for refusing enforcement of the modified settlement agreement. In response, it was said that the word "substantially" would introduce a discretionary or subjective assessment by the competent authority and was therefore not desirable.

46. In relation to subparagraph (c)(iii), as a matter of drafting, it was suggested to replace the words "so that" after the word "conditional" by the words "in that". As a matter of substance, it was said that that subparagraph as currently drafted would not properly cover situations where parties after mediation did not intend to enforce the obligations therein but rather formulated the settlement agreement as a framework to shape their future relation and clarify mutual obligations. It was suggested that the focus of the provision should be on the obligations not being intended to be performed under the given circumstances, instead of the settlement agreement itself being conditional. In that light, it was suggested that subparagraph (c)(iii) could be modified along the lines of: "contains obligations for the party against whom relief is sought that are not enforceable independent of other parts of the agreement or were not agreed to be performed at the time the relief is sought". In response, it was clarified that the purpose of the current subparagraph (c)(iii) was to encapsulate the non-fulfilment of existing preconditions. A further suggestion was made to avoid the use of the term "conditional" as that term might carry different legal meanings in different legal traditions. It was suggested that it would be preferable to draft the provision in a descriptive fashion, for instance, along the lines of "relief sought by the requesting party is related to an obligation of that party which has not been performed".

47. In relation to subparagraph (c)(iv), it was suggested that the subparagraph should be revised to state "is so unclear and incomprehensible that it is not capable of being enforced according to its terms." In support of that suggestion, it was said that such modification would make it clear to the competent authority that the focus of its assessment would be with regard to the terms of the settlement agreement. It was explained that the suggested revision aimed at providing guidance and a framework to the competent authority to implement the provision. In response, it was said that such a revision would not bring clarity to the provision, and might result in accommodating jurisprudence in certain States to the detriment of others. Another suggestion was to revise the subparagraph along the following lines: "is so unclear and incomprehensible that it is not capable of being relied upon". Yet another

suggestion was that the subparagraph should focus only on the operative provisions in the settlement agreement.

48. It was also suggested that subparagraph (c)(iv) should be deleted as it was already covered in subparagraph (b) and, if retained, could pose uncertainties on how it was to be implemented by competent authorities. Along the same lines, it was pointed out that paragraph 1(c) was not necessary as the grounds contained therein were sufficiently addressed in paragraph 1(b).

Proposal

49. After discussion, the Working Group considered the following proposal (the "Proposal") regarding article 5(1)(a) to (c) of the draft convention and article 18(1)(a) to (c) of the draft amended Model Law (with the necessary adjustments): "1. The competent authority of the Contracting State where relief is sought under article 4 may refuse to grant relief at the request of the party against whom the relief is sought, only if that party furnishes to the competent authority proof that: (a) a party to the settlement agreement was under some incapacity; (b) the settlement agreement sought to be relied upon: (i) is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Contracting State where relief is sought under article 4; (ii) is not binding, or is not final, according to its terms; (iii) has been subsequently modified; or (iv) [option A: is not capable of being relied upon because its operative part is not clear or comprehensible][option B: is so unclear or incomprehensible that it is not capable of being relied upon]; (c) the obligations in the settlement agreement have been performed; (c bis) [option X: granting relief would be contrary to the terms of the settlement agreement in the circumstances then prevailing] [option Y: the obligations in the settlement agreement of the party against whom the relief is sought cannot be relied upon independent of other parts of the agreement or have not yet arisen] [option Z: the settlement agreement is conditional in that the obligations in the settlement agreement of the party against whom relief is sought have not yet arisen]; (...)".

50. The Proposal was generally considered as a drafting improvement. Suggestions were made in relation to the options provided for in subparagraphs (b)(iv) and (c bis).

Subparagraph (b)(iv) of the Proposal

51. The suggestion to delete subparagraph (b)(iv) was reiterated because the terms "clear" or "comprehensible" were not necessarily familiar in certain jurisdictions and could be interpreted differently. That suggestion did not receive support.

52. There was a general preference for option A. Various suggestions were made to clarify the words "operative part", including to replace the word "operative" by "prescriptive", or by referring to the "terms" of the settlement agreement. Yet, another suggestion, which received support, was to specify that "the obligations" in the settlement agreement were not clear or comprehensible.

53. After discussion, the Working Group agreed to merge subparagraph (b)(iv) with subparagraph (c) by adding the words "or are not clear or comprehensible" at the end of subparagraph (c).

Subparagraph (c bis) of the Proposal

54. The Working Group considered the options provided for in subparagraph (c bis). In support of option X, it was said that it avoided reference to legal terms that could be understood differently in different legal systems. It was explained that the words "in the conditions then prevailing" had been inserted in option X to provide guidance to the competent authority. It was, however, agreed that those words might introduce ambiguity and were not necessary. It was suggested that option X could be improved along the following lines: "Granting relief would be contrary to the terms of the

settlement agreement, among other reasons, for not fulfilling the provisions contained in the settlement agreement or because the other party has not fulfilled its own obligations."

55. It was said that option Y was ambiguous, and if retained, it should be clarified to indicate that the obligations in the settlement agreement of the party against whom the relief was sought related to obligations of the other party that had not been, or could not be, performed or were subject to events that had not occurred or could not occur. It was noted that option Z was based on subparagraph (c)(iii) as contained in document A/CN.9/WG.II/WP.205/Add.1.

56. During the deliberation, it was pointed out that subparagraph (c bis) might overlap with the public policy exception already provided for in paragraph 2 of both article 5 of the draft convention and article 18 of the draft amended Model Law.

57. After discussion, the Working Group approved subparagraph (c bis), which would read: "Granting relief would be contrary to the terms of the settlement agreement". It was confirmed that such wording was broad enough to encompass situations in which the obligations in a settlement agreement would be conditional or reciprocal, and their non-performance could be justified for a variety of reasons. It was said that many different circumstances could affect the enforceability of obligations in settlement agreements, in particular in complex contractual arrangements, and that subparagraph (c bis) should be broadly interpreted as covering a variety of factual situations. It was further highlighted that the circumstances that had been provided for in options Y and Z would be covered.

58. Subject to the above-mentioned changes (see paras. 53 and 57 above), the Working Group approved in substance the Proposal regarding article 5(1)(a) to (c) of the draft convention and article 18(1)(a) to (c) of the draft amended Model Law.

4. Conclusions on article 5 of the draft convention and article 18 of the draft amended Model Law

59. After discussion, the Working Group approved in substance article 5 of the draft convention (and article 18 of the draft amended Model Law with the necessary adjustments), which would read along the following lines:

"Article 5. Grounds for refusing to grant relief

"1. The competent authority of the Contracting State where relief is sought under article 4 may refuse to grant relief at the request of the party against whom the relief is sought, only if that party furnishes to the competent authority proof that: (a) A party to the settlement agreement was under some incapacity; (b) The settlement agreement sought to be relied upon: (i) Is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Contracting State where relief is sought under article 4; (ii) Is not binding, or is not final, according to its terms; (iii) Has been subsequently modified; (c) The obligations in the settlement agreement have been performed, or are not clear or comprehensible; (d) Granting relief would be contrary to the terms of the settlement agreement; (e) There was a serious breach by the mediator of standards applicable to the mediator or the mediation, without which breach that party would not have entered into the settlement agreement; or (f) There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party, without which failure that party would not have entered into the settlement agreement.

"2. The competent authority of the Contracting State where relief is sought under article 4 may also refuse to grant relief if it finds that: '(a) Granting relief would be contrary to the public policy of that State;' or '(b) The subject matter of the dispute is not capable of settlement by mediation under the law of that State.'"

60. As a drafting improvement, a suggestion was made to regroup the various grounds, in particular in light of the observations made that certain grounds were illustrations of the ground provided for in paragraph (1)(b)(i). In that context, the following drafting suggestion was made: "(1) The competent authority of the Contracting State where relief is sought under article 4 may refuse to grant relief at the request of the party against whom the relief is sought, only if that party furnishes to the competent authority proof that: (a) a party to the settlement agreement was under some incapacity; (b) the settlement agreement sought to be relied upon is null and void, inoperative or incapable of being performed [under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Contracting State], including when: (i) the settlement agreement (1) is not binding, or is not final, according to its terms; or (2) has been subsequently modified; (ii) the obligations in the settlement agreement (1) have been performed; or (2) are not clear or comprehensible; (iii) granting relief would be contrary to the terms of the settlement agreement; (…)".

61. While there was some support for that drafting improvement (in particular, to make the text of article 5 of the draft convention and article 18 of the draft amended Model Law simpler and for the purposes of promoting the adoption of the draft instruments by States), it was considered that regrouping of grounds posed practical challenges, in particular, with regard to the application of the party's freedom to choose the applicable law in paragraph 1(b). Therefore, it was agreed to retain the structure of the provisions as found in paragraph 59 above.

62. In so doing, the Working Group took note of extensive consultations among delegations aimed at clarifying the various grounds provided for in paragraph 1, in particular the relationship between subparagraph (b)(i), which mirrored a similar provision of the New York Convention and was considered to be of a generic nature, and subparagraphs (b)(ii), (b)(iii), (c) and (d), which were deemed to be illustrative in nature. It was noted that various attempts for regrouping the grounds had been unsuccessful.

63. A further suggestion was made to add a new paragraph in article 5 aimed at providing guidance to competent authorities when considering the different grounds. One of the drafting suggestions read: "3. The competent authority, in interpreting and applying the various grounds for refusing requested relief under paragraph 1, may take into account that the grounds for such refusal identified under paragraph 1(b) may overlap with other grounds for refusal in paragraph 1." The Working Group took note that attempts at clarifying and possibly providing guidance on paragraph 1 had also not been successful.

64. It was further noted that such attempts represented serious efforts at avoiding overlap in light of the importance of the issue. However, difficulties arose because of the need to accommodate the concerns of different domestic legal systems, which resulted in the failure of such attempts to gain consensus.

65. Therefore, the Working Group expressed a shared understanding that there might be overlap among the grounds provided for in paragraph 1 and that competent authorities should take that aspect into account when interpreting the various grounds.

66. After discussion, the Working Group reiterated its approval of article 5 of the draft convention and article 18 of the draft amended Model Law (see para. 59 above) subject to the following editorial modifications. First, the word "or" should be added between subparagraphs (b)(ii) and (b)(iii) and second, subparagraph (c) should be revised as follows: "The obligations in the settlement agreement (i) have been performed; or (ii) are not clear or comprehensible."

67. In relation to the notion of public policy in article 5(2)(a) of the draft convention and article 18(2)(a) of the draft amended Model Law, it was said that it would be up to each Contracting State to determine what constituted public policy. In that context, it was agreed that public policy could include, in certain cases, issues relating to national security or national interest.

G. Parallel applications or claims

68. A number of suggestion were made with respect to article 6 of the draft convention and article 18(3) of the draft amended Model Law, which dealt with parallel proceedings which may affect the enforcement of a settlement agreement. It was recalled that the text was based on article VI of the New York Convention.

69. One suggestion was that the provision should apply to both when enforcement of a settlement agreement was sought and when a settlement agreement was invoked as a defence. Accordingly, it was suggested that wording such as "relief being sought" should be used instead of "enforcement". Another suggestion was that the words "if it considers proper" should be deleted as they might be considered as providing too much discretion to the competent authority in making a decision on whether to adjourn the decision to grant relief. The latter suggestion did not receive support.

70. After discussion, the Working Group approved in substance article 6 of the draft convention and article 18(3) of the draft amended Model Law which would read as follows (see also para. 139 below): "If an application or a claim relating to a settlement agreement has been made to a court, an arbitral tribunal or any other competent authority which may affect the relief being sought under article 4, the competent authority of the Contracting State where such relief is sought may, if it considers it proper, adjourn the decision and may also, on the request of a party, order the other party to give suitable security."

H. Issues regarding the draft convention

1. Article 7 – Other laws or treaties

71. The Working Group approved in substance article 7 of the draft convention, unchanged.

2. Article 8 – Reservations

States and other public entities (article 8(1)(a))

72. With respect to article 8(1)(a) of the draft convention, a suggestion was made to replace it with a provision along the following lines: "Nothing in this Convention shall affect privileges and immunities of States or of international organizations, in respect of themselves and of their property." That suggestion did not receive support. It was further recalled that the Working Group had agreed that a State should be given certain flexibility in excluding from the scope of the draft instruments settlement agreements to which it was a party or which its government agencies or any person acting on behalf of a governmental agency was a party (see A/CN.9/896, para. 62).

73. It was generally noted that the objective of permitting a reservation was to allow a State to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State. In that context, it was noted that the draft convention did not contain any explicit provision that it applied to such settlement agreements. However, it was explained that the broad scope of application as provided in article 1(1) of the draft convention should be interpreted to encompass such settlement agreements.

74. It was further explained that the inclusion of a reservation along the lines of article 8(1)(a) would give flexibility to States and thus make it possible for more States to consider becoming a party to the draft convention.

75. With respect to the two options provided for in article 8(1)(a), there was general support for option 2 as it clearly indicated that the State making that reservation would be limiting the scope of application of the draft convention. In that context, it was suggested that the word "only" should be deleted.

76. However, based on the perspective that the draft convention should not apply to such agreements, a view was expressed that option 1 should be retained in the draft convention and that the provision as a whole could be included in the scope provision. That view was not supported.

77. After discussion, the Working Group approved in substance the following text for article 8(1)(a): "1. A Contracting State may declare that: (a) it shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration."

Opt-in and opt-out by parties (article 8(1)(b))

78. With regard to how article 8(1)(b) of the draft convention would operate in practice, the Working Group confirmed its understanding that even without an explicit provision in the draft convention, parties to a settlement agreement would be able to exclude the application of the draft convention. It was further mentioned that such an agreement between the parties excluding the application of the draft convention would be given effect by the competent authority, because if a party were to seek relief relying on such an agreement, it would be refused as being contrary to the terms of the settlement agreement as provided for in article 5(1)(d) of the draft convention and article 18(1)(d) of the draft amended Model Law (see para. 59 above).

79. With that understanding, the Working Group approved in substance article 8(1)(b), unchanged.

Heading of article 8

80. With the understanding that paragraph 1(a) and (b) constituted reservations, the Working Group agreed that the heading of article 8 should remain unchanged.

No other reservations permitted (article 8(2))

81. A suggestion to include a reciprocal reservation in the draft convention similar to that found in article I(3) of the New York Convention did not receive support.

82. A further suggestion was made to delete article 8(2) in order to allow States to make additional reservations. It was stated that even without article 8(2), States would not be able to make reservations that were incompatible with the object and purpose of the draft convention according to article 19 of the Vienna Convention on the Law of Treaties (the "Vienna Convention").

83. In response, it was stated that because article 8(3) allowed for reservations set out in article 8(1) to be made at any time, there was a need to retain a balance by restricting additional reservations. It was further noted that a number of private international trade law instruments included provisions that did not permit unauthorized reservations (for instance article 98 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) and article 22 of the United Nations Convention on the Use of Electronic Communications in International Contracts). Concerns were expressed that if article 8(2) were to be deleted, a wide range of reservations could be made, particularly with regard to the scope of application of the convention, thus making the regime envisaged by the convention potentially confusing for commercial parties and creating legal uncertainties. As an example, it was mentioned that if a State were to formulate a reciprocity reservation along the lines of article I(3) of the New York Convention, parties would not be certain whether the convention would be applicable as it would not necessarily be feasible to identify a country of origin of the settlement agreement.

84. With a view to address the above-mentioned concerns, another proposal was made that reservations not expressly authorized in the draft convention would be permitted only at the time of signature, ratification, acceptance or approval, with the withdrawal of reservations being possible at any time, and entering into force six months after deposit. That suggestion did not receive support.

85. Based on the understanding that the draft convention would operate in the context of international trade law and that there was a need to provide legal certainty on its application, the Working Group agreed to retain article 8(2) unchanged.

Reservations to be made "at any time" (article 8(3))

86. With respect to the fourth sentence of article 8(3), it was suggested that the words "or at the time of making a declaration under article 12" should be added after the word "accession", which received support.

87. In response to an observation that the possibility to make a reservation at any time as provided for in article 8(3) was not usual in treaty practice, it was explained that that approach had been adopted in treaties dealing with international trade law and private law matters. In addition, it was said that the flexibility provided would be an incentive for States considering to join the convention. It was further indicated that reservations might need to be made at any time for the purposes of article 12 of the draft convention.

88. In order to enhance legal certainty for parties to settlement agreements, the following text was suggested for addition in article 8(3): "A reservation made after the time of signature, ratification, acceptance or approval shall not affect applications under article 4, which have been made before that reservation entered into force." It was explained that the purpose of the suggested text was to avoid parties from being deprived of the possibility of enforcing a settlement agreement due to a later reservation. In that context, it was mentioned that the last sentence of article 8(3) already provided a grace period during which parties could initiate the procedure under article 4 and thus there was no need for an additional text.

89. In relation to the suggested text in paragraph 88 above, it was said that the words "applications under article 4" should be replaced by "settlement agreements". However, it was highlighted that it might not be easy to verify when a settlement agreement was concluded and, therefore, it would be preferable to retain the reference to "applications". A further suggestion was that the draft convention should not only address the effect of reservations on settlement agreements but more generally the effect of entry into force of the convention as well as any reservation.

90. Thereafter, the Working Group considered the following text to be placed as a separate provision in the draft convention: "The Convention and any reservation, or withdrawal of a reservation shall apply only to settlement agreements concluded after the date when the Convention, reservation, or withdrawal of reservation enters into force for the Contracting State." It was further suggested that the last sentence of article 15(2) should be revised as follows: "The Convention shall continue to apply to settlement agreements concluded before the denunciation takes effect."

91. While it was noted that the New York Convention did not have such a temporal scope provision, the draft additional provision in paragraph 90 above as well as the revision to article 15(2) received general support. A suggestion to delete the reference to "withdrawal of a reservation" to facilitate enforcement of settlement agreements that were not enforceable before the withdrawal of the reservation did not gain support as it could lead to uncertainty about the application of the draft convention to such settlement agreements.

92. After discussion, the Working Group approved in substance the draft provision as outlined in paragraph 90 above for insertion in the draft convention along with the corresponding revision to article 15(2).

Conclusion on article 8

93. Subject to the modifications reflected in paragraphs 77 and 86 above, the Working Group approved in substance article 8 of the draft convention.

3. Articles 9 and 10

94. After discussion, the Working Group approved in substance articles 9 and 10 of the draft convention, unchanged. In that context, the delegation of Singapore expressed an interest in hosting a ceremony for the signing of the convention, once adopted. That proposal was welcomed and supported by the Working Group and it was agreed to make the corresponding recommendation to the Commission.

4. Article 11 — Regional economic integration organizations

95. With respect to article 11 of the draft convention, it was explained that inclusion of that article would facilitate a regional economic integration organization and its member States becoming party to the draft convention.

96. It was suggested that article 11(4) could be revised along the following lines: "This Convention shall not prevail over conflicting rules of a regional economic integration organization, whether adopted or entered into force before or after this Convention: (a) if, under article 4, relief is sought to a competent authority of a State that is member of such an organization and all the States relevant under article 1(1) are members of any such organization; or (b) as concerns the recognition or enforcement of judgments as between member States of the regional economic integration organization."

97. In response to a question on how article 11(4)(b) as proposed in paragraph 96 above would operate, it was explained that subparagraph (b) would ensure that when a party invoking a settlement agreement in a court of a member State of the regional economic integration organization was not granted relief under the convention, such a judgment by the court would circulate within the regional economic integration organization, while that party would no longer be able to rely on the settlement agreement in a court of another member State of the regional economic integration organization. It was pointed that, in practice, this would require a party to seek relief in only one member State of the regional economic integration organization.

98. Subject to the proposed revision to paragraph 4 (see para. 96 above), the Working Group approved in substance article 11 of the draft convention.

5. Article 12 — Non-unified legal systems

99. The Working Group considered article 12, which would permit a Contracting State, at the time of signature, ratification, acceptance, approval or accession, to declare that the convention would extend to all its territorial units or only to one or more of them and to amend its declaration by submitting another declaration at any time. That provision was said to be a well-established standard provision in private international law instruments.

100. The Working Group agreed that the heading of article 12 should read "Non-unified legal systems".

101. A suggestion to delete article 12(3)(b) did not receive support, as that provision was said to clarify the notion of "place of business" in States having different territorial units.

102. Another suggestion was made to clarify that a Contracting State making a declaration under article 12 would have the discretion to make different reservations over time for different territorial units. In response, it was said that the practice of making or withdrawing reservations in relation to different territorial units was established, and it would not be necessary to include a provision for that purpose in the draft convention.

103. After discussion, the Working Group approved in substance article 12 of the draft convention, unchanged, with the heading "Non-unified legal systems".

6. Article 13 — Entry into force

104. Divergent views were expressed on paragraph 1 which provided that the draft convention would enter into force after the deposit of the third instrument of ratification, acceptance, approval or accession.

105. One view was that the number of ratifications required for the entry into force of the convention should be higher (for example, ten) for the reasons that: (i) there was no urgency for the draft convention to enter into force; (ii) a higher threshold would result in more confidence in the regime envisaged therein; and (iii) States would be encouraged to promote the convention more widely in order to ensure its coming into force.

106. Another view was that requiring three ratifications would be appropriate for the purposes of the draft convention as that: (i) had been the general practice and trend for private international law treaties, and there was no compelling reasons for providing for a higher threshold; (ii) would ensure the earlier entry into force of the convention, which would allow for relevant practice to develop for the benefit of other States that would consider becoming parties to the convention; and (iii) would send a positive signal for the users of mediation that an international legal framework for the enforcement of settlement agreements would soon be in place.

107. While some hesitation was expressed, after discussion and for the purposes of achieving consensus, it was agreed that the draft convention should enter into force after the deposit of the third instrument of ratification, acceptance, approval or accession.

108. While a suggestion was made to add the phrase "or regional economic integration organization" after the word "State" in the first sentence of article 13(2), it was agreed that article 11(3) sufficiently addressed the underlying concern.

109. The Working Group agreed that six months would be an appropriate period for the purposes of article 13. Therefore, it was agreed that the word "six" should be kept outside square brackets in paragraphs 1 and 2.

110. As a drafting point, it was agreed that the words "on the first day of the month following the expiration of" and the words "date of" should be deleted in paragraphs 1 and 2. It was also agreed that the words "enters into force" would be replaced by "shall enter into force".

111. Subject to the above-mentioned changes (see paras. 109 and 110 above), the Working Group approved in substance article 13 of the draft convention.

7. Article 14 — Amendment

112. The Working Group agreed that the references to "four" months in paragraph 1 and to "six" months in paragraphs 4 and 5 were appropriate and therefore, it agreed that those words should be retained outside square brackets. The Working Group further agreed that the word "Secretary-General of the United Nations" in paragraph 3 should be replaced by the word "depositary" in line with article 9 of the draft convention.

113. A concern was raised regarding paragraph 6, in that it established a difference of treatment between States. As per paragraph 4, States that were Contracting States prior to the entry into force of the amendment had a choice whether to be bound or not by the amendment. On the contrary, under paragraph 6, States that became Contracting States after the entry into force of the amendment would have no choice but to adopt the convention as amended. In response to the observation that paragraphs 4 and 6 would result in two different regimes for Contracting States before and after an amendment to the convention, the Working Group agreed to consider the issue further. It was generally felt that amendments should enter into force for States only when they expressly consented to it.

114. Having considered various options, the Working Group agreed that the draft convention should provide that amendments would enter into force only for States that had expressed their consent to be bound by them, and that this would also be the case for States adopting the convention after the amendment. Accordingly, the Working Group agreed that paragraph 6 of article 14 should be deleted and that paragraphs 3 to 5 would read as follows: "3. An adopted amendment shall be submitted by the depositary to all the Contracting States for ratification, acceptance, or approval. 4. An adopted amendment shall enter into force six months after the date of deposit of the third instrument of ratification, acceptance, or approval. When an amendment enters into force, it shall be binding on those Contracting States that have expressed consent to be bound by it. 5. When a Contracting State ratifies, accepts, or approves an amendment following the deposit of the third instrument of ratification, acceptance, or approval, the amendment enters into force in respect of that Contracting State six months after the date of the deposit of its instrument of ratification, acceptance, or approval."

8. Article 15 — Denunciation

115. The Working Group agreed that "twelve" months would be an appropriate period for the purposes of article 15 and therefore agreed to retain that word outside square brackets. It was further agreed that the words "on the first day of the month following the expiration of" should be deleted. Subject to those changes, as well as the agreed modification reflected in paragraph 90 above, the Working Group approved in substance article 15 of the draft convention.

9. "Contracting States"

116. With regard to the use of the term "Contracting States" in the draft convention, the attention of the Working Group was drawn to the fact that that term was referred to in article 2(1)(f) of the Vienna Convention to mean a State which had consented to be bound by the treaty, whether or not the treaty had entered into force. In that light, a suggestion was made to replace the term "Contracting States" by the words "Parties" or "State Parties" to mean a State which had consented to be bound by the treaty and for which the treaty was in force in accordance with article 2(1)(g) of the Vienna Convention.

117. In response, it was noted that the use of the term "Parties" could be confusing as the draft convention often referred to "parties" to the settlement agreement and thus, it was suggested that the term "States Parties" might be more appropriate. Another suggestion was to use the term "Contracting Parties", while it was noted that that term might be more confusing and not known in the treaty law context. The Working Group also noted that the term "Contracting States" had been used in existing conventions in the field of international trade law.

118. After discussion, the Working Group agreed that the draft convention could tentatively use the terms "Parties to the Convention" or "a Party to the Convention". It was further clarified that the draft convention would continue to refer to "States" where appropriate.

I. Issues regarding the draft amended Model Law

119. The Working Group noted that the presentation of the provisions of the draft amended Model Law in three sections in document A/CN.9/WG.II/WP.205/Add.1 reflected the suggestions made at its sixty-seventh session (A/CN.9/929). There was general support for that structure. In its deliberations of the draft amended Model Law, the Working Group generally agreed that the guiding principles would be to ensure a level of consistency with the draft convention and at the same time to preserve the existing text of the Model Law to the extent possible.

1. Scope

120. The Working Group approved in substance article 1(1) (in section 1) of the draft amended Model Law, which set forth the expanded scope of the draft amended Model Law, applying to both international commercial mediation and international settlement agreements. It also approved article aa(1) and 15(1), which provided the scope of application of sections 2 and 3, respectively.

2. "Internationality" of the mediation and of settlement agreements

121. The Working Group noted that the draft amended Model Law included two separate provisions on the notion of internationality: (i) articles aa(2) and aa(3) (definition of international mediation), which mirrored articles 1(4) and 1(5) of the Model Law, and (ii) articles 15(4) and 15(5) (definition of international settlement agreement), which mirrored the corresponding provision in the draft convention.

122. The Working Group considered whether the internationality of a settlement agreement should be assessed at the time of the conclusion of the agreement to mediate or at the time of the conclusion of the settlement agreement.

123. In favour of the latter, it was said that assessment of the internationality of the settlement agreement at the time of its conclusion would be more in line with the approach taken in the draft convention. Further, that would also cater for situations where there might not necessarily be an agreement to mediate between the parties. It was further suggested that assessment of internationality as provided for in article 15(4)(b) (referring to the obligations of the parties under the settlement agreement), would not be feasible at the time of the conclusion of the agreement to mediate as the place of performance of such obligation would not be known at that time.

124. Whilst the benefit of consistency with the draft convention was acknowledged, it was also pointed out that parties to international mediation might expect the settlement agreement resulting from that process to be subject to enforcement under section 3 of the draft amended Model Law. Therefore, caution was expressed about entirely disconnecting the internationality of the settlement agreement from the mediation process itself. A view was expressed that an international mediation would rarely result in a purely domestic settlement agreement not falling under the scope of section 3. It was noted that referring to agreement to mediate would also make it possible to determine the applicability of the law at the time mediation was initiated, thereby providing more legal certainty to the parties.

125. However, it was reiterated that the regime for enforcement of international settlement agreements as provided for in section 3 should not be made applicable to purely domestic settlement agreements. It was observed that article 14 of the Model Law referred to the enforceability of settlement agreement, without requiring such agreements to be international. It was therefore suggested that article 14 of the Model Law in section 2 could govern enforcement of settlement agreements resulting from international mediation, whereas section 3 should be strictly applicable to settlement agreements that were international at the time of their conclusion. Such an approach was said to preserve the existing approach under the Model Law.

126. It was therefore suggested that options should be provided in the draft amended Model Law regarding whether section 3 would also apply to settlement agreements that were not international under article 15(4), but resulted from international mediation under article aa(2). The first option would suggest that section 3 should only apply to international settlement agreements that were international at the time of their conclusion according to article 15(4). The second option would suggest that States might also apply section 3 to settlement agreements resulting from international mediation as defined in article aa(1). It was noted that, for the purpose of consistency, referring to "international mediation" would be preferable than referring to the "agreement to mediate", which was not a defined term in the Model Law nor in the draft amended Model Law.

127. After discussion, the Working Group approved in substance articles 15(4) and 15(5) with the deletion of the square-bracketed text. It further agreed that section 3 would include a footnote incorporating the second option, in which a State could provide in article 15(4) an additional paragraph stating that a settlement agreement was "international" if it resulted from international mediation as defined in article aa(2) and (3).

3. Article 1(6) of the Model Law

128. The Working Group had agreed not to include a provision similar to article 1(6) of the Model Law in the draft convention. In that light, the Working Group considered whether article 1(6) should be retained in the draft amended Model Law and, if so, whether it should be placed in section 1 or 2 of the draft amended Model Law. Suggestions to delete article 1(6) entirely or to make it applicable to section 3 only did not receive support.

129. After discussion, it was agreed that article 1(6) of the Model Law should be placed in section 2 of the draft amended Model Law and revised as follows: "This section also applies to commercial mediation when the parties agree that the mediation is international or agree to the applicability of this section."

4. Articles 1(7) to 1(9) of the Model Law

130. The Working Group considered whether articles 1(7) to 1(9) of the Model Law should be retained in the draft amended Model Law and, if so, in which section. After discussion, it was agreed that those articles should be placed in section 2 with the replacement of the word "Law" by "Section".

5. Article 3 of the Model Law

131. After discussion, it was agreed that article 3 of the Model Law should be placed in section 2 with appropriate cross-references to relevant articles and with the replacement of the word "Law" by "Section".

6. Article 14 of the Model Law

132. While some concerns were expressed about retaining article 14 in section 2 of the draft amended Model Law (as the term "settlement agreement" was defined in section 3 and grounds for refusing enforcement of a settlement agreement included the settlement agreement not being binding), it was generally felt that article 14 should be retained in section 2 as it dealt with the outcome of the mediation process, which should be binding and enforceable. It was further said that article 14 provided a natural link to the provisions in section 3. The Secretariat was requested to revise article 14 (including its title) as a provision in section 2 of the draft amended Model Law.

7. Agreements settling disputes not reached through mediation

133. The Working Group then considered the possible expansion of the scope of section 3 of the draft amended Model Law to apply to agreements not reached through mediation as provided for in footnote 4 of the draft amended Model Law. Diverging views were expressed.

134. One was that the draft amended Model Law should include a footnote in section 3 that would indicate that States might wish to consider that possibility. It was suggested that a footnote in the draft amended Model Law would promote harmonization which was one of the objectives of the instrument, while providing sufficient flexibility to States that might wish to broaden the scope of section 3.

135. Another view was that the draft amended Model Law should not include such a footnote as the draft instruments focused on "mediated" settlement agreements and that even without such an indication as provided for in footnote 4, States would be able to broaden the scope of the draft amended Model Law if they wished to do so.

136. After discussion, it was agreed that footnote 4 in the draft amended Model Law would be retained in its current form outside square brackets.

137. In addition, it was agreed that section 3 would include an additional footnote, reflecting the reservation provided for in article 8(1)(b) of the draft convention, which would read as follows: "A State may consider enacting this section to apply only where the parties to the settlement agreement agreed to its application."

J. Other issues relating to the draft instruments

1. Translation issues

138. The Working Group took note of drafting issues that might arise from ensuring consistency among the various linguistic versions of the draft instruments, which would require further adjustments to the text. It was pointed out that, for instance, the words "granting relief" might need to be adjusted in certain language versions of the draft instruments.

2. Structural suggestions

139. During the deliberation, the following drafting suggestions were made: (i) to align article 18 of the draft amended Model Law with articles 5 and 6 of the draft convention, which would result in paragraph 3 of article 18 becoming article 19 (see para. 70 above); (ii) to align the structure of the draft convention to follow the structure of the draft amended Model Law, which would result in reversing the order of articles 2 and 3 in the draft convention; and (iii) to revise the title of section 3 of the draft amended Model Law to better reflect its contents. All those suggestions were approved.

3. Draft General Assembly resolution

140. With respect to the proposed wording for the General Assembly resolution provided in paragraph 3 of document A/CN.9/WG.II/WP.205/Add.1, it was suggested that the following words should be inserted at the end: "nor any expectation to sign, ratify or accede or implement one instrument or the other." Another proposal was made to replace the phrase "without creating any preference for the instrument [that interested States may adopt][to be adopted]" by the words "without creating any expectations for which of the instruments interested States would adopt". Doubts were expressed about the need for the additional language, as States would in any case retain the freedom to adopt any of the draft instruments.

141. While it was mentioned that resolution 69/116 of the General Assembly adopting the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration contained the phrase "without creating any expectation", it was also recalled that the rationale for inserting such a phrase was quite different.

142. After discussion, it was agreed that the word "concurrently" would be inserted after the words "decision of the Commission to" and that the last part of the paragraph would read as follows: "without creating any expectation that interested States may adopt either instrument."

4. Title of the draft instrument

143. The Working Group tentatively approved the title of the draft convention as: "United Nations Convention on International Settlement Agreements Resulting from Mediation".

144. With respect to the provisional title of the draft amended Model Law, the Working Group approved the following: "UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002)."

5. Preamble to the draft convention

145. The Working Group approved the preamble of the draft convention as provided for in paragraph 5 of document A/CN.9/WG.II/WP.205/Add.1 subject to replacing the words "such dispute settlement methods" by "mediation".

6. Materials accompanying the draft instruments

146. The Working Group turned its attention to the question of materials that could be prepared to accompany the draft instruments. The suggestion to supplement the Guide to Enactment of the Model Law with information on the revised and additional provisions of the amended Model Law received support. Regarding the material accompanying the draft convention, it was suggested that the reports of the sessions of the Working Group and of the Commission devoted to the preparation of the draft convention, which encompassed a vast amount of information that was shared during the negotiation process, should be compiled and presented in a user-friendly manner on the UNCITRAL website.

147. The suggestion to prepare additional reports or interpretative guidelines on the draft convention did not receive support.

148. After discussion, the Working Group agreed that, resources permitting, the *travaux preparatoires* should be compiled by the Secretariat, so that they could be easily accessible and user-friendly. It was further agreed that the Secretariat should be tasked with the preparation of a text to supplement the Guide to Enactment of the Model Law.

V. Future work

149. Having completed its work on the draft instruments, the Working Group considered agenda item 5 on possible future work. Various suggestions were made.

1. Possible revision of the UNCITRAL Conciliation Rules (1980) and preparation of notes on mediation

150. The Working Group considered whether the Conciliation Rules would need to be updated as they did not necessarily reflect recent developments in the field (see para. 5 of document A/CN.9/WG.II/WP.205). Possible areas of work included: providing a comprehensive definition of mediation; defining the effect of the agreement to refer a dispute to mediation; elaborating on the appointing authority mechanism; providing additional elements regarding the content of the request for mediation, and further statements; and adding provisions on preparatory meetings. It was suggested that the Conciliation Rules, if revised, could include provisions aimed at strengthening due process aspects in mediation and elaborating on the impartiality and independence of mediators, their role and expected conduct.

151. It was further suggested to consider preparation of notes, akin to the UNCITRAL Notes on Organizing Arbitral Proceedings, with the aim of having a complete set of mediation instruments including an explanation for practitioners. Such notes would be intended to be used in a general and universal manner, taking account of works undertaken by other relevant organizations.

2. Expedited arbitration procedure and adjudication

152. A proposal was made to examine the issue of expedited dispute resolution and to develop a set of tools to address different aspects. It was suggested that that could have two components, which could be handled simultaneously: (i) the development of model rules, model contractual clauses, or similar tools facilitating the use of expedited arbitration procedures for reducing the cost and time of arbitration; and (ii) the development of model legislative provisions or model contractual clauses

facilitating the use of adjudication in the context of long-term projects, in particular construction projects.

153. With respect to the first component, it was explained that expedited arbitration procedures had been a focus of many arbitral institutions in recent years, in part as a response to concerns among users about rising costs and lengthier timelines making arbitration more burdensome and similar to litigation. The usefulness of having a common international expedited procedure framework was highlighted, as there was an increasing demand to resolve simple, low value cases by arbitration but there was a lack of international mechanisms to cope with such disputes.

154. With respect to the second component, it was pointed out that adjudication could be useful in the context of long-term projects where work must continue despite disagreements regarding quality or payment. It was noted that adjudication clauses were used and a number of jurisdictions had enacted legislation on adjudication. It was suggested that model legislative provisions and contractual clauses could be developed to facilitate the broader use of adjudication.

155. It was highlighted that the two components would fit together well, as one would provide generally applicable tools for reducing the cost and time of arbitration, while the other would facilitate use of a particular tool that has demonstrated its utility in efficiently resolving disputes in a specific sector.

3. Uniform principles on the quality and efficiency of arbitral proceedings

156. Another proposal, which would build on the above-mentioned proposal (see para. 152 above), was to develop uniform principles on the quality and efficiency of arbitral proceedings. Those principles would build on existing norms and practices and take the form of soft law instruments or legislative provisions. It was highlighted that the principles would address concerns raised in relation to commercial arbitration procedure. The following sub-topics were identified: emergency arbitration; arbitration clauses and non-signatory parties; legal privileges and international arbitration; basic uniform principles for arbitral institutional rules; expedited arbitration procedure; and adjudication. It was stressed that the principles would contribute to strengthening the arbitration framework.

4. General discussion

157. As a general point, it was suggested that the recommendations of the Working Group on future work should be based on the needs of the users, particularly those of the business community, and on the feasibility of the work. It was also emphasized that any work should focus on promoting arbitration as an efficient method and avoid possible over-regulation. It was further mentioned that any decision should also respond to the request of developing States that were in their initial stages of implementing a legislative framework for dispute resolution.

158. It was also suggested that any future work should not impact work currently being conducted by other Working Groups, particularly Working Group III on investor-State dispute settlement reform. It was generally mentioned that any future work should not overlap with those being planned at other international organizations.

159. There was general support for the future work topics mentioned above (see paras. 150–156).

160. There was general support for giving priority to work on expedited arbitration procedure, which would maximize the benefits of arbitration. Considering the criticism that arbitration was a lengthy and costly process, it was said that that work would be timely and reflect the needs of the businesses. In that context, it was noted that caution should be taken so that family and consumer law issues should be excluded from that work and its focus should be on commercial arbitration. It was also suggested that the topic could be expanded to address more comprehensively expedited procedures as a means to ensure efficient resolution of disputes.

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161. There was also some support for work on adjudication. It was explained that such work should focus on adjudication as a mechanism to accelerate proceedings and to provide a provisional enforcement of decisions, which would be subject to review by the same tribunal or another arbitral tribunal. Nonetheless, there was some hesitation about undertaking work on adjudication as it would mainly concern a specific industry and as it required a more detailed assessment of the legislative framework surrounding adjudication as well as the practice that governed adjudication clauses. It was also questioned whether it would be feasible to undertake such work concurrently with work on expedited arbitration procedure. It was thus suggested that a gradual approach could be taken by first taking stock of relevant practice and assessing feasibility of any work in that area. In so doing, it was suggested that the focus could be on (i) adjudication as an efficient means to solve disputes in long-term contracts generally, as well as (ii) the means to ensure provisional enforcement of decisions.

162. As to the preparation of principles on quality and effectiveness, it was emphasized that there could be benefit in assessing the current status of arbitration and to further develop principles to ensure that arbitration continued to be an efficient method for resolving disputes. It was further noted that quality and effectiveness would in any case form the basis of any work on arbitration. It was suggested that the scope of work being suggested was quite broad. Thus, it was suggested that efforts should be made to narrow down the scope of work to those matters that would require more urgent work. Some interest was expressed for engaging in work on non-signatories and on group enterprises. It was further pointed out that the work might not necessarily result in soft law instruments and might result in legislative texts.

5. Conclusion

163. After discussion, the Working Group agreed to recommend to the Commission that the Secretariat be mandated (i) to work on updating the Conciliation Rules to both reflect current practice and be consistent with the contents of the draft instruments to be finalized by the Commission in 2018 and (ii) to prepare notes on organizing mediation proceedings. It was suggested that such further work on mediation should be conducted by the Secretariat in consultation with experts and relevant organizations in the field of mediation and that the final product could be presented to the Commission at a future session.

164. The Working Group also agreed to recommend to the Commission that work on expedited arbitration procedure should be given priority for future work, together with the suggestion to work on the preparation of uniform principles, which could serve as an umbrella for other topics. Regarding adjudication, the Working Group agreed to bring that topic to the attention of the Commission, taking into account that more information might need to be provided as highlighted above (see para. 161 above).